No. 87-1213

In The

Supreme Court of the United States

October Term, 1987

BAJA CONTRACTORS, INC., et al.
Petitioners,

vs.

THE CITY OF CHICAGO, et al.
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals correctly held that Petitioners were afforded due process when the City of Chicago denied Petitioners' application for certification as a Minority Business Enterprise on the ground that Petitioners' business was a "front" for non-minority businesses.

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STATEMENT OF THE CASE

Petitioners Baja Contractors, Inc. ("Baja") and Humberto Jaimes filed this action under 42 U.S.C. § 1983 against Respondents herein, the City of Chicago ("the City") and five of its employees: Mary Skipton, Acting Purchasing Agent; Leroy Bannister, First Deputy Purchasing Agent; Paul Spieles, Director of Contract Compliance for the Department of Purchases, Contracts, and Supplies;

McNair Grant, Assistant Purchasing Agent; and Sam Patch, Administrative Assistant to the Mayor. Petitioners claimed that Baja was denied certification in the City's Minority Business Enterprise ("MBE") program, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, when the City found that Baja was a "front" for non-minority owned businesses. After hearing, the district court entered a preliminary injunction on Petitioners' behalf.

Respondents filed an interlocutory appeal pursuant to 28 U.S.C. § 1292(a). The Court of Appeals reversed the preliminary injunction, holding, in a fact-intensive opinion, that "with respect to whether Baja was operating as a front, the procedures employed [by the City] were adequate to satisfy the demands of due process", in accordance with the mandate of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Baja Contractors, Inc. v. City of Chicago*, 830 F. 2d 667, 680 (7th Cir. 1987).

In their Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit ("Petition"), Petitioners argue that the Court of Appeals misapplied *Mathews v. Eldridge* to the particular facts of this case. These facts, discussed at length by the Court of Appeals, are summarized below.

1. The Applications for MBE Certification

Baja, an Illinois corporation formed in 1983 by Mr. Jaimes, performed its first contract in 1984 when it earned $ 7,000 acting as a "concrete contractor." A "concrete *contractor*" pours concrete and applies the finishing to concrete areas, and is a business that requires little capital investment.

In December, 1984, Baja applied to the City for MBE certification and described its business as that of a "concrete contractor." Baja listed its only experience as the $ 7,000 concrete finishing job, and stated that its

equipment included the tools used by a "concrete contractor." An employee of the City's Purchasing Department verified that Baja had performed the $ 7,000 contract, received Baja's corporate and other relevant documentation, and then referred Baja's application to the City's MBE Certification Committee for consideration.

The MBE Certification Committee, comprised of personnel from various City departments, reviewed Baja's application and supporting documentation in light of the MBE standards set forth in 49 C.F.R. Part 23, which were promulgated by the United States Department of Transportation ("USDOT") and adopted by the City in administering its MBE program. The regulations state in part that an eligible MBE "shall be an independent business. The ownership and control by minorities or women shall be real, substantial, and continuing and shall go beyond the *pro forma* ownership of the firm as reflected in its ownership documents." 49 C.F.R. § 23.53(a)(2). The regulations also state that substantial concern had been expressed about the infiltration of MBE programs by "fronts" for white-owned businesses, and that consequently it was extremely important to scrutinize all firms seeking MBE certification and participation. 49 C.F.R. Part 23, subpart D, app. A, at 150.

Based on Baja's initial experience as a "concrete contractor" and its possession of the necessary equipment to perform that type of work, the MBE Certification Committee voted to certify Baja as a MBE. Baja was notified by letter dated February 28, 1985, that its application had been granted, and that Baja's specialty would be listed in the City's MBE directory as a "concrete contractor."

Baja never performed work as a certified MBE "concrete contractor." Instead, in May, 1985, Baja began work as a "concrete *supplier*" at the O'Hare Airport Development Project, having received a $ 10 million subcontract to manufacture and supply concrete for the construction. This was

the second contract of Baja's corporate existence, the first having been the $ 7,000 finishing contract in which Baja had performed as a "concrete contractor." In contrast to the function and capability of a "concrete contractor", a "concrete *supplier*" operates a batching plant to manufacture concrete from various raw materials, and uses redi-mix revolving trucks to deliver the manufactured concrete to a construction site. It is a highly capital intensive business requiring specialized training and technological expertise.

After being notified of Baja's $ 10 million concrete supply contract, the City informed Baja that because it had been certified only as a "concrete contractor," it would need to apply for MBE certification as a "concrete supplier." Baja then retained legal counsel to gather and to present evidence in support of its new application for certification as a "concrete supplier."

Baja's attorney, Jerome Siegan ("Siegan"), had been an employee in the City's Law Department, with certain special responsibilities for the City's MBE program, until he joined the Chicago law firm of Arvey, Hodes, Costello, & Burman on June 1, 1985. Before he drafted Baja's application for MBE certification as a "concrete supplier" in July, 1985, Mr. Siegan reviewed 49 C.F.R. Part 23, which he knew contained the standards employed by the City in considering applications for MBE certification, and which articulated the requirement of an applicant's "independence" from white-owned businesses and the concern about the infiltration of MBE programs by "fronts". He then prepared Baja's application and supporting documentation and submitted them to the City.

After receiving these materials, the City's Purchasing Department performed a site inspection of Baja's operations to see if Baja was running the concrete supply business by itself. The inspection revealed that the majority of the employees at Baja's job site worked for two large white-owned businesses, Poulos and Sons ("Poulos") and Material

Service Corporation ("Material Service"), a subsidiary of General Dynamics Corporation, and that Baja lacked the ability to operate the computer system which controlled the concrete mixing plant.

The results of the site inspection were communicated to the MBE Certification Committee, which reviewed that information along with the documentation submitted by Baja. After discussion, the committee voted unanimously to deny MBE certification to Baja as a "concrete supplier." The evidence demonstrated that Baja was not an independently operated concrete supply business, and was dependent upon Poulos and Material Service, two non-minority businesses, for providing the personnel, technical assistance, and equipment necessary to function as a "concrete supplier." That decision and the underlying reasons were communicated to Baja by a letter of September 9, 1985.

2. Reconsideration and Appeal

Shortly after receiving the negative decision, Baja's counsel met with various officials of the City and asked them to reconsider Baja's "concrete supplier" application. Mr. Siegan was again told that the domination and control of Baja by Material Service, the largest concrete supplier in the Chicago area, was the major reason for the denial of the application since Baja appeared to be acting as a "front" for that non-minority business. Baja eventually requested a formal reconsideration by the City in a letter of February 20, 1986, appealed on March 6, 1986 to the Secretary of the USDOT pursuant to the provisions of 49 C.F.R. § 23.55, and filed a written appeal to the City's Purchasing Agent on March 10, 1986.

The Purchasing Agent agreed to consider an appeal, pursuant to which a meeting was held on March 24, 1986 with Mr. Jaimes, Baja's counsel Mr. Siegan, and the Assistant Purchasing Agent, to discuss the basis and the reasons for the City's September, 1985 denial of Baja's application. The Assistant Purchasing Agent requested

additional documents from Baja, and stated that the City would conduct a second site visit of Baja's operations.

During the week of April 7, 1986, a City accountant visited Baja's operations, interviewed Baja's controller, examined Baja's purchase orders, invoices, tax returns, and billing practices, and was given a tour of Baja's facilities. As a result of this examination, the accountant concluded and stated to the First Deputy Purchasing Agent that Material Service was the major source of raw materials purchased by Baja; that Material Service provided invoicing, billing, computerized invoice receipts, and truck leasing services to Baja at no apparent cost; that an employee of Material Service was on Baja's premises mixing the raw materials; and that Baja was acting merely as an agent for Material Service. The First Deputy Purchasing Agent informed Baja's counsel that it was unlikely that Baja would receive favorable treatment on its appeal because the material facts had not changed since September, 1985, when the application had been denied: Baja's concrete supply operations were controlled by a non-minority business.

Thereafter, Petitioners filed suit claiming that the City had deprived them of their property rights without providing due process of law, and after hearing the district court entered a preliminary injunction. The Court of Appeals reversed, holding that "*as applied in this case*", "the procedures employed [by the City] were adequate to satisfy the demands of due process." 830 F. 2d at 679, 680 (emphasis in original).

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS RAISES NO ISSUES JUSTIFYING THE ISSUANCE OF THE WRIT.

A. The Decision Below was Intrinsically Fact Bound, Fact Specific, and Narrowly Drawn.

In reversing the district court's issuance of the preliminary injunction, the Court of Appeals rejected Baja's invitation to analyze due process in the abstract and, instead, focused on the treatment afforded *Baja:*

> We begin by noting the limited, indeed focused, inquiry before us. Our task is not to determine whether the *entire* MBE review process employed by the City affords *all* businesses due process in *all* aspects of the administration of the program. Rather, our task is to determine whether, in the particular posture of this case, Baja was afforded due process when the City proposed to limit its MBE certification so as to exclude its operation as a concrete supplier.
>
> . . .
>
> We believe that the City's procedures, *as applied in this case,* afforded Baja adequate protection against the risk of an erroneous deprivation of its property interest.
>
> . . .
>
> [I]n our view, it is simply unnecessary, in this litigation, to address in such broad fashion the adequacy of *all* of the City's procedures. It is sufficient to determine that, with respect to whether Baja was operating as a front, the procedures employed were adequate to satisfy the demands of due process. Since the course followed by the City authorities in this case adequately reconciled the private and public interests involved and reduced to a minimum the possibility of an erroneous deprivation of Baja's property interest, the mandate of *Mathews* has been met.

830 F. 2d at 677, 679, 680 (emphasis in original).

This Court traditionally has refused to exercise its certiorari jurisdiction to consider such fact specific matters. *See, e.g., Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J., respecting the denial of certiorari), *citing United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). *Accord NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (writ of certiorari presenting primarily a question of fact dismissed as improvidently granted). This Petition supports the wisdom of that general rule.

B. The Considerations for Issuance of the Writ Set Forth in Rule 17 Are Absent in this Case.

None of the considerations articulated in this Court's Rule 17 are raised by this Petition. Petitioners have not suggested that the decision of the Court of Appeals is in conflict with a decision of another federal court of appeals on the same matter, that the decision below is in conflict with that of a state court of last resort, that the Court of Appeals departed from the accepted usual course of judicial proceedings, or that the court below decided a federal question in conflict with the applicable decisions of this Court.

The only remaining Rule 17 consideration, which is the apparent basis for the Petition, seems to be the contention that "a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court. . . ." According to the Petition, the important but unsettled constitutional question is the precise scope and "contours" of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), as applied factually and particularly to MBE programs nationwide (Petition at 25).

This fact specific inquiry is not the kind of question contemplated by Rule 17. The broad and fundamental question of constitutional law – the nature and scope of the due process clause in the context of administrative

decisions affecting property rights – has already been settled by *Mathews v. Eldridge* itself, which has given workable and clear direction to the lower courts in adjudicating fact specific claims of procedural due process violations. Indeed, Petitioners describe as "unassailable" the *Mathews v. Eldridge* formulation and analysis for "determining the constitutional sufficiency of administrative procedures," and complain only about the result reached below (Petition at 24, 25). A complaint that the lower court misapplied the law to a particular set of facts simply is not the kind of important and unsettled question which is the focus of Rule 17.

Additionally, the issues raised in the Petition are not appropriate for *judicial* resolution, since Petitioners are essentially asking this Court to promulgate specific due process procedures which must be applied with respect to all MBE programs nationwide. Furthermore, the suggestion of across-the-nation procedural uniformity goes against the grain of the direction staked out repeatedly by this Court over the years in holding that the specific requirements of due process will vary depending upon the circumstances of the administrative program at issue. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 314 (1950) (the particular requirements of due process in a specific situation are those "appropriate to the nature of the case", "with due regard for the practicalities and peculiarities of the case"); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."); *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) ("The formality and procedural requisites for the hearing can vary.").

Precisely what kind of hearing is constitutionally required has been left to the lower courts to decide based on the particular facts presented. "Experience teaches that what is fundamentally fair in terms of the form and time of

the notice and hearing must of necessity depend on circumstances that will vary from case to case. No rigid, inflexible formula will fit all situations." *Signet Constr. Corp. v. Borg*, 775 F. 2d 486, 490 (2d Cir. 1985), *cited in Baja Contractors, Inc. v. City of Chicago*, 830 F. 2d at 677. This is exactly why the Court of Appeals focused on the actual facts presented in this case, and why the lower court's judgment based on those particular findings is not an important federal question which should be the subject of the Court's certiorari jurisdiction.

C. The Court Should Not Issue the Writ to Review an Appeal of an Interlocutory Order.

Petitioners brought their motion for preliminary injunction to a hearing before the district judge on an expedited basis, and after the district court rendered its oral opinion, Respondents filed an interlocutory appeal pursuant to 28 U.S.C. § 1292(a). Without having to decide a number of appellate issues raised by Respondents, the Court of Appeals reversed the entry of the preliminary injunction on the very fact specific and narrow grounds discussed above. The case on the merits remains pending in the district court.

The Court's certiorari jurisprudence includes the principle that "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384 (1893). *Accord Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application. . . ."). *Cf.* Brennan, *Some Thoughts on the Supreme Court's Workload*,

66 Judicature 230, 231 (1983) ("[W]e have made mistakes in granting certiorari at an interlocutory stage of a case when allowing the case to proceed to its final disposition below might produce a result that makes it unnecessary to address an important and difficult constitutional question . . . "). Given the interlocutory stage of this case, particularly in light of the fact-bound nature of the issues decided below, the Court should deny the Petition.

II. THE COURT OF APPEALS FAITHFULLY APPLIED THIS COURT'S PROCEDURAL DUE PROCESS JURISPRUDENCE.

The Court of Appeals considered the standards set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), in holding unanimously as a matter of law "that the City's procedures, *as applied in this case*, afforded Baja adequate protection against the risk of an erroneous deprivation of its property interest." 830 F. 2d at 679 (emphasis in original). Rather than demonstrating that the Court of Appeals applied erroneous legal principles, Petitioners instead persist in quoting the ultimate legal conclusions reached by the district court (Petition at 29-31) which were rejected by the Court of Appeals. The underlying facts clearly demonstrate that Baja received fair treatment, and support the Court of Appeals' legal conclusion that the mandate of *Mathews v. Eldridge* was met.

Baja was on notice from the outset that it would not receive MBE certification if it acted as a "front" for a non-minority business. Clearly appreciating their burden, Petitioners seized the opportunity to present all of their evidence to rebut the assertion that Baja was a front rather than an independently operated organization. The MBE Certification Committee reviewed the documents prepared by Baja's sophisticated counsel and considered the result of a site inspection, all in light of the MBE standards set forth in the federal regulations. It denied Petitioners' application because of the evidence which revealed that Baja was

acting as a front for white-owned businesses. The decision and the underlying reasons were communicated in writing to Baja, and were then discussed again with Baja and its counsel in several face to face meetings. Again acting through its counsel, Baja presented additional rebuttal evidence and arguments in support of its position, and the City also performed a second site inspection which once again revealed that Baja was dependent upon white-owned businesses for its very existence. Finally, Baja pursued an administrative appeal to the USDOT in accordance with its statutory rights under 49 C.F.R. § 23.55.

No request made by Baja or its counsel to meet with the City was ever refused, and Baja took advantage of many opportunities to present whatever evidence it had to support its claims of independence from non-minority businesses. *Cf. Barry v. Barchi*, 443 U.S. 55, 65 (1979) (no violation of due process where plaintiff "was given more than one opportunity to present his side of the story"). The Court of Appeals applied the appropriate legal analysis mandated by this Court in *Mathews v. Eldridge*, and based on the particular facts below held that the City had not deprived Baja of property without due process of law. It is clear that Petitioners received fundamentally fair treatment, and that their complaint lies not with the process but with the result.

III. PETITIONERS' COUNSEL'S SIMULTANEOUS REPRESENTATION OF PETITIONERS AND RESPONDENT CITY IS GROSSLY IMPROPER, AND UNDER SUCH CIRCUMSTANCES THE COURT SHOULD DENY THE WRIT.

Petitioners' Counsel of Record is Gary L. Starkman of the Chicago law firm of Arvey, Hodes, Costello & Burman ("Arvey, Hodes"). Until the Petition was filed in this Court, neither Mr. Starkman nor any attorney affiliated with Arvey, Hodes represented Petitioners in this litigation, either in the district court or the Court of Appeals.

This was because Arvey, Hodes had admitted to the district judge that it would be unethical to do so.

Mr. Siegan, a member of Arvey, Hodes since June 1, 1985, represented Baja in connection with its application for MBE certification as a concrete supplier, at the same time Mr. Siegan and his firm were representing the City on other matters. When Mr. Siegan took the witness stand on behalf of Petitioners at the preliminary injunction hearing, he testified that "at such time as [he] or [his] firm would have been adverse to the City of Chicago in connection with the Baja matter . . . [he] would have asked the City for permission to do so", and that he "drew the line at the filing of a lawsuit." Transcript of Proceedings before the district court on May 1, 1986, at 212. It is disturbing, therefore, that Arvey, Hodes never sought the consent of its client (the City) to represent Petitioners against the City in *this* Court, even though that law firm is *simultaneously representing the City* on other substantial matters.

By undertaking representation adverse to the City, a *present* client, without seeking and obtaining its permission to do so, Petitioners' counsel has violated the duty of undivided loyalty which an attorney owes to all clients. Model Code of Professional Responsibility DR5-105(B); Model Rules of Professional Conduct, Rule 1.7(a) ("A lawyer shall not represent a client if the representation of that client will be directly adverse to another client. . . . "); *United Sewerage Agency v. Jelco, Inc.*, 646 F. 2d 1339, 1345 (9th Cir. 1981) ("representation adverse to a *present* client must be measured . . . against the duty of undivided loyalty which an attorney owes to each of his clients"); *International Business Machines Corp. v. Levin*, 579 F.2d 271, 283 (3d Cir. 1978) ("An attorney who fails to observe his obligation of undivided loyalty to his client injures his profession and demeans it in the eyes of the public."); *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F. 2d 1384, 1386 (2d Cir. 1976) ("Putting it as mildly as we can, we think it would

be questionable conduct for an attorney to participate in any lawsuit against his own client without the knowledge and consent of all concerned.").

The impropriety created by the simultaneous representation is compounded by the fact that Mr. Siegan was an employee in the City's Law Department until May 31, 1985, and had responsibility for supervising the drafting of vital aspects of the City's MBE program. Transcript of Proceedings before the district court on May 5, 1986, at 149-150. Under these circumstances neither Mr. Siegan nor his law firm may represent Petitioners in their *attack* on the MBE program. *See* Model Code of Professional Responsibility DR9-101(B) ("A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."); *LaSalle Nat. Bank v. County of Lake*, 703 F.2d 252 (7th Cir. 1983) (former government attorney and his private law firm disqualified where law firm represented client in litigation against government body); *see also* Model Rules of Professional Conduct, Rule 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter . . . represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client. . . .").

The appearance by Petitioners' counsel in this Court is grossly improper. The Court need not exercise its discretionary certiorari jurisdiction in favor of such unethical conduct.

CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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